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No. 97-586

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Petitioners,

v.

LOUDOUN COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's ruling in Hendrick Hudson School District v. Rowley, which sets forth the standard of judicial review of administrative proceedings in cases brought under the IDEA, should be modified to allow district courts to view the administrative proceedings as essentially irrelevant.

2. Whether the Fourth Circuit's reversal of the district court's decision, based on its conclusions that the district court misapplied the law and did not give due deference to the two decisions of the administrative hearings, was proper.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Loudoun County Board of Education, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners in this case.

STATEMENT OF THE CASE

A. Procedural History

The U.S. Court of Appeals for the Fourth Circuit, on July 8, 1997, ruled in favor of the Loudoun County Board of Education ("Loudoun"), reinstated the decisions of the administrative hearing officers and reversed the district court's decision of November 27, 1997, as being contrary to the law. This decision was the culmination of several years of proceedings.

This case originated with administrative proceedings brought under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") [1] at the request of Loudoun on June 24, 1994. Loudoun requested a due process hearing to gain permission to implement an individualized education plan ("IEP") developed on May 31, 1994, for an autistic student named Mark Hartmann ("Mark"). A-5. The proposed IEP provided for a combined placement in regular education and special education classes at a regular elementary school. Id. Mark's parents refused to give consent for his academic instruction to take place in a special education setting. Id.

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[1] References in this brief to the IDEA will cite to the original version in effect at the time these proceedings were initiated rather than the reauthorized version of the IDEA which became effective on June 4, 1997.

Five days of local administrative hearings, which included the testimony of eighteen witnesses, were held from August 15, 1994 through October 27, 1994, under 20 U.S.C. § 1415(b)(2). The local hearing officer ruled on December 21, 1994, that Loudoun's proposed IEP offered Mark a free appropriate public education and ordered its implementation. A-47. Immediately following this decision, Mrs. Hartmann moved with Mark to Montgomery County, Virginia, and enrolled him in the public school system there. A-6. The Hartmanns have sought no educational services for Mark from Loudoun since that time. His education has been provided free of charge in Montgomery County, Virginia. The last IEP proposed for Mark by Loudoun was the May 31, 1994 IEP developed prior to Mark's removal.

The Hartmanns appealed the adverse decision of the local hearing officer to the state level. The state review officer on May 3, 1995, affirmed the decision of the local hearing officer, again finding that Loudoun's proposed IEP was appropriate. A-6.

The Hartmanns filed an appeal to federal district court pursuant to 20 U.S.C. § 1415(e)(3) on December 6, 1995. The district court granted a motion to dismiss Dr. Edgar B Hatrick, Superintendent, and Ned Waterhouse, Director of Pupil Personnel Services as defendants.[2] The district court denied Loudoun's motion to dismiss the case as moot due to Mark's relocation to Montgomery County, Virginia.

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[2] No appeal of the decision to dismiss defendants Hatrick and Waterhouse was made.

The district court received some additional evidence on September 8 and 9, 1996. The district court ruled on November 27, 1996, and by supplemental opinion dated December 16, 1996, that the administrative proceedings should be reversed and that a placement in regular education should be developed in anticipation of Mark's return to the Loudoun County Public Schools.[3] A-6.

On July 8, 1997, the Fourth Circuit ruled in favor of Loudoun finding that the district court's decision was contrary to law. The decision held that, contrary to the dictates of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), the district court impermissibly substituted its notion of educational policies for those of the school authorities (A-8), that the court impermissibly ordered an ideal education by "re-writ[ing] state teaching certification requirements in the guise of applying the IDEA" (A-14), and did not give due deference to the administrative proceedings (A-17).

B. Underlying Dispute

The essence of this case is an educational dispute arising in 1994 over the setting in which Mark was to spend a portion of his school day. Because no services have been

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[3] As represented to the Fourth Circuit, Mark's parents did not plan to seek his return to Loudoun prior to the Fall of 1997. As of this date, Mark still has not sought readmission to Loudoun.

sought by the Hartmanns from Loudoun since this time, there are no subsequent or current IEPs to be reviewed.

An IEP was developed for Mark by Loudoun in the Spring of 1994. This case was brought to resolve the dispute over the location in which Mark was to receive some of his academic instruction. Under both the Hartmanns' plan and Loudoun's plan, Mark was to attend a regular education elementary school, receive daily one-to-one instruction in speech and language, and participate with his regular education peers in art, music, physical education, library, lunch and recess. The plans differed over where Mark would receive his academic instruction for his content classes, such as language arts, mathematics, science and social studies. Loudoun wanted this instruction to occur in a special education class for autistic students and the Hartmanns wanted this instruction to occur in a regular class with the assistance of a one-to-one aide. A-5, 49.

Although Mark was entitled to remain in the Hartmanns' desired placement, the regular education class with a one-to-one aide, during the pendency of the administrative proceedings due to the stay-put requirement of IDEA (20 U.S.C. § 1415 (e)(3)), the Hartmanns chose to remove Mark from Loudoun's regular education class in December 1994. A-6. Mark was then enrolled in the Montgomery County, Virginia, Public Schools. The Hartmanns have not sought educational services or an IEP from Loudoun since December 1994 and believe Mark has been receiving a free appropriate public education.

In the petition to this court, the Hartmanns have abandoned their challenge to the appropriateness of Loudoun's proposed IEP, which was the sole issue which giving rise to the administrative proceedings. Their current claim is a technical challenge to the review standard used by the Fourth Circuit. This challenge is ironic because the Fourth Circuit determined that the district court failed to apply the correct review standard set out in 20 U.S.C. § 1415(e) and as interpreted in Hendrick Hudson School District v. Rowley, supra. The Fourth Circuit, however, correctly applied the law when it rendered its decision of July 8, 1997.

REASONS FOR DENYING THE WRIT

The Hartmanns request this Court's review based on their assertion that the Fourth Circuit applied an incorrect standard of review. On the contrary, the Fourth Circuit found that it was the district court which had misapplied the law as stated by this Court in Hendrick Hudson School District v. Rowley, supra. (hereinafter "Rowley"). The Hartmanns' claim is all the more bizarre because they specifically allege that the Fourth Circuit had applied the appropriate review standard in earlier cases decided by the Fourth Circuit under the IDEA. Petition at 11. Basically, the Hartmanns' assigned error involves "the misapplication of a properly stated rule of law." In such cases, review is rarely granted. Rule 10 of the Rules of the United States Supreme Court. These arguments do not warrant review by this Court. Accordingly, this case does not present any compelling or novel issues for review and the petition should be denied.

A. THE STANDARD OF REVIEW UTILIZED BY THE FOURTH CIRCUIT WAS IN ACCORD WITH ROWLEY AND WITH STATUTORY DIRECTIVES.

The IDEA provides that in reviewing administrative proceedings, the court must:

> (B) Additional requirements
> In any action brought under this paragraph, the court--
> (i) shall receive the records of the administrative proceedings;
> (ii) shall hear additional evidence at the request of a party; and
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. 1415(e)(2).

This Court has previously interpreted this statutory language in Rowley.

> We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases

> assure much if not all of what Congress wished in the way of substantive content in an IEP.
>
> Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Rowley, supra at 206-7.

In the case for which review is sought by this Court, both the local and state administrative proceedings resulted in decisions affirming the appropriateness of Loudoun's proposed IEP. No decision, including that of the district court, found procedural defects of any kind much less in the process by which Loudoun's proposed IEP was developed. Thus, the IEP calling for Mark's placement developed by Loudoun in accordance with proper procedures and

affirmed by the administrative proceedings was appropriate according to Rowley.

The district court's decision to reverse under these circumstances "set the state decisions at nought" and resulted in the impermissible substitution of educational judgment prohibited by Rowley. When there were no procedural defects found, Loudoun's decision as reflected in Mark's IEP should not have been set aside by the district court. There existed a difference in educational philosophies over how Mark should be educated. The district court failed to give due weight to these administrative proceedings.

B. THE FOURTH CIRCUIT DID NOT ESTABLISH A NEW STANDARD OF REVIEW.

The Hartmanns inaccurately portray the decision of the Fourth Circuit as requiring that "considerable deference" be given to the administrative proceedings. Petition at 6. This assertion misstates the entirety of the holding by the Fourth Circuit. The Fourth Circuit, began its legal analysis by citing both the relevant statutory review requirement of 20 U.S.C. § 1415(e)(2) and the language of Rowley which interpreted this language. A-7. The court noted, consistent with Rowley, that courts must give "due weight" to the state administrative proceedings. Id. The Fourth Circuit then determined that "[t]he district court's ruling strayed generally from the aforementioned principles." A-8.

In contrast, the district court's decision did not recite either the statutory or Rowley review standards. The Fourth Circuit concluded that the decision of the district court did "not reflect the teachings of Rowley" concerning the deference to be given to the administrative proceedings. A-10. While the Fourth Circuit Court at one place did reference "considerable deference", it is clear from the decision as a whole that this standard was no different from the "due deference" standard articulated by this Court in Rowley. Significantly, the Hartmanns concede that the Fourth Circuit had correctly applied the "due deference" standard in prior rulings of the court. Petition at 11. Thus, there is no reason to conclude a contrary or improper standard was applied in this case. A correct reading of the Fourth Circuit's decision does not reveal the application of an incorrect standard.

In actuality, it is the Hartmanns who argue for acceptance of a new standard which would give "reduced weight" to the administrative proceedings rather than the "due weight" required by Rowley. The Hartmanns concede in their petition that the district court "was compelled to reduce the weight to be given the administrative proceedings." Petition at 13. This acknowledgment of the application of an incorrect standard by the district court underscores the correctness of the Fourth Circuit's determination that the district court's decision was contrary to the law.

The Hartmanns argue in essence that no "due deference" should be give the administrative proceedings because the passage of time and other changes in Mark

"rendered the initial decision essentially irrelevant." Petition at 15. This argument, if accepted, would render meaningless the entirety of the administrative procedures set up under the IDEA. The resulting implication of accepting such an argument would be to encourage parties who lose in the administrative proceedings to delay appeals to court to the end of the limitations period and then argue that, due to the passage of time, any prior adverse administrative ruling is "essentially irrelevant." This result is not contemplated by either the statutory standard of review or by Rowley's instruction to give due weight to the administrative proceedings.

C. THE PETITIONERS CANNOT AVOID THE CORRECT APPLICATION OF ROWLEY BY ASSERTING THAT THEY WERE SEEKING PROSPECTIVE RELIEF.

The Hartmanns incorrectly attempt to distinguish their case from Rowley by characterizing their suit as one seeking prospective relief. This fictional distinction ignores the fact that this case, like most IDEA cases, concerns a challenge to the appropriateness of a school district's IEP. Thus, the circumstances are ordinary rather than exceptional and do not require the application of a separate review standard.

Rowley, furthermore, dealt with a request for prospective relief rather than for reimbursement. The issue in Rowley concerned whether interpreter services were required as part of an appropriate program. This request was in the nature of prospective relief. The review

standard announced in Rowley is thus applicable to this case. The Hartmanns incorrectly attempt to create a dual review standard depending on whether the relief sought concerns retroactive tuition reimbursement or the review of the student's IEP. This court has not established this dual standard. Mark's case, to the extent it sought prospective relief, is clearly akin to Rowley and requires the application of that review standard.

D. THE DECISION TO REVERSE THE DISTRICT COURT WAS BASED ON LEGAL CONCLUSIONS RATHER THAN ON FACTUAL DETERMINATIONS.

The final argument advanced by the Hartmanns for granting the petition is their assertion that the Fourth Circuit incorrectly reviewed the factual findings of the district court. According to the rules of this court, writs requested on this basis are rarely granted. Rule 10 of the Rules of the United States Supreme Court. Moreover, this argument overlooks the varied legal grounds given for reversing the decision of the district court.

The Fourth Circuit found that the district court's decision was contrary to law, which determination is not challenged in this petition. As recited previously, the Fourth Circuit concluded that the district court did not give due deference to the administrative proceedings. The district court basically reweighed the credibility of the opinions of the many experts who testified in the five days of administrative proceedings and whom it had not heard testify. This process was contrary to Federal Rule of Civil

Procedure 52(a) which requires that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Under these circumstances, the local hearing officer who heard five days of testimony served as the trial court. Presumably, the ability of the administrative hearing officer to hear live evidence while the district court only hears supplemental evidence provided a basis for the requirement imposed to give the administrative proceedings "due weight." The finding by the district court that witnesses it had not observed were not credible is contrary to established legal principles. See, e.g., Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1992); McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd* 427 U.S. 160 (1976). The district court's decision was accordingly contrary to law.

Other grounds given by the Fourth Circuit for reversing the district court's decision were based on a determination that the decision was contrary to law. For example, the district court improperly concluded that Loudoun's teaching personnel were unqualified even though they met state standards for certification. The Fourth Circuit's decision found this conclusion to be contrary to law. "We can think of few steps that would do more to usurp state educational standards and policy than to have federal courts re-write state teaching certification requirements in the guise of applying the IDEA." A-14. The Fourth Circuit also concluded that the district court did not interpret the least restrictive environment and mainstreaming standards in accordance with case law. A-7 to A-11. These unchallenged legal conclusions of the Fourth Circuit provide further legal, as opposed to factual, support

for its reversal of the district court's opinion. Rather than a reversal based on a redetermination of facts, the Fourth Circuit reversed the district court's decision as being contrary to law. The narrow challenge by the Hartmanns to the Fourth Circuit's decision, while leaving unchallenged these significant additional legal conclusions, does not present a case worthy of review by this Court.

CONCLUSION

For the reasons stated above, the Loudoun County Board of Education respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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